

## REMARKS

Claims 17 – 220, 41 – 47 and 54 - 61 are pending. No claims are added. No claims are cancelled. Claims 54 – 61 stand withdrawn due to a constructive election requirement which is respectfully traversed as discussed below.

It is respectfully asserted that the Final rejection reflects a mis-reading or misunderstanding of the response to the previous Office Action. It is hoped that a careful reconsideration of the issues discussed below will result in withdrawal of the rejections of the claims without the necessity of Appeal.

### **I. Rejections under 35 USC §103**

Claims 17, 18, 20, 41, 42, 46 and 47 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over the '428 patent to Obel et al. (Obel) and the '326 patent to Collins (Collins) in view of the '898 patent to Limousin (Limousin). Claim 19 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Obel, Collins and Limousin as applied to Claim 17 and further in view of the '187 patent to Adams (Adams). Claims 43 – 45 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Obel, Collins and Limousin in view of the '277 patent to Sjostrand, et al. (Sjostrand). Applicant respectfully traverses all rejections.

The claims are limited to a device that adjusts electrical nerve stimulation delivered during a delivered cardiac pacing therapy responsive to physiological parameters monitored during delivery of the cardiac pacing therapy. Obel's device simply does not do this.

The nerve stimulation therapies of Obel are delivered according to pre-programmed parameters which are not varied during their delivery, i.e. not varied during

the associated cardiac pacing therapy. As such Obel functions contrary to the limitations of claim 17 and all claims dependent thereon. While the parameters of the nerve stimulation therapies delivered by the Obel device may change over time, they change only in response to events occurring before their delivery, and therefore responsive only to events that occurred prior to delivery of the accompanying cardiac pacing therapy.

Because Obel does not include the teaching it is cited for and in fact teaches the contrary, the rejections of the claims over Obel are respectfully asserted to be clearly erroneous. The cited Collins and Limousin references are not cited as containing this missing teaching and do not in fact contain this missing teaching. Withdrawal of the rejections of claims 17, 18, 20, 41, 42, 46 and 47 is thus respectfully requested.

The cited text in the Abstract of Obel does not contradict the above assertions. The cited text is directed toward initiation of the therapy, which of necessity must occur responsive to parameters sensed prior to initiation of the therapy. As described in detail in the specification, pacing is initiated concurrent with the nerve stimulation therapy in Obel. The cited text thus actually proves the correctness of applicants' assertions.

Finally, it should be noted that applicants' previous response did not somehow suggest that the claims of the present application included the requirement of delivering pacing apart from nerve stimulation. The argument presented did not depend in any way upon this limitation being present in the claims. The preceding argument, like the present argument is based upon the indisputable fact that the Obel patent does not teach adjusting nerve stimulation during delivery of a pacing therapy based upon physiologic parameters sensed during the delivery of the pacing therapy as required by all claims.

The Adams and Sjostrand references cited against claims 19 and 43 – 45 are not cited as making up for the deficiencies of Obel as discussed above with regard to

claim 17 and in fact do not make up for these deficiencies. Withdrawal of the rejections of claims 19 and 43 – 45 is thus respectfully requested

Accordingly, applicant respectfully asserts that claim 17 as amended and all claims dependant thereon are patentable over the cited references. Withdrawal of the rejection under 35 U.S.C. § 103(a) of all previously submitted claims is respectfully requested.

Because no previously submitted claims have been amended, It is respectfully asserted that any new rejection of the previously submitted claims, including any rejection based on a new interpretation of the Obel, Collins, Limousin, Adams and/or Sjostrand references must take the form of a non-final rejection.

## **II. Restriction requirement**

New claims 54 - 61 stand withdrawn due to a restriction requirement based on constructive election. This restriction requirement and the resultant corresponding withdrawal of the claims are respectfully traversed.

As noted previously, these claims have limitations corresponding to those of the previously submitted claims, rewritten very slightly for clarity, and are believed patentable for exactly the same reasons as the originally submitted claims. Since all new claims contain all of the limitations of previously pending claim 17, it is respectfully asserted that the restriction requirement is clearly erroneous. The addition of these claims is no different from the addition of new dependent claims, narrowing the scope of the invention originally presented for examination.

Withdrawal of the restriction requirement is respectfully requested.

**Conclusion**

In view of the foregoing, it is submitted that this application is in condition for allowance. Favorable consideration and prompt allowance of the application are respectfully requested.

Should any issues remain outstanding, the Examiner is urged to telephone the undersigned to expedite prosecution. The Commissioner is authorized to charge any deficiencies and credit any overpayments to Deposit Account No. 13-2546.

Respectfully submitted,

Date: August 21, 2009

/Reed A Duthler/  
Reed A. Duthler  
Reg. 30,626  
Telephone: (763) 526-1564  
Customer No. 27581